1948

File No. O. Village Panchayat/48

Legal DEPARTMENT

A BRANCH

Subject:- O. Village Panchayat

P.L.

Opinions under the

Bombay Village Panchayat

Act, 1933.

File No. O. Village Panchayat/48

118-A

H. Scott, Slip 24 L. e.

C O N T E N T S.

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SC.

The President, District Local Board, Thana, recommends that the term of office of the Village Panchayat at Umbergam may be extended under sec. 11(2) of the Bombay Village Panchayats Act on the ground that drastic changes have been introduced in the new Act. Both the Collector of Thana and the Commr., N.D., however, state that the existing term of office of the Village Panchayat at Umbergam has expired.

The question for R.L.A's consideration is whether under sec. 11(2) of the Bombay Village Panchayats Act, 1933, the Collector can extend the term of the Village Panchayat, Umbergam, which has already expired.

Sd/- 12/1

(Mad).K.V.G./17-5

The view taken by R.T.C. and L.Dept. is correct (See R.L.A's opinion No. 563 dated 18-1-1938 where a similar question was considered)

Sd/- R.T.C. 12/1

R.L.A.

Sd/- R.L.A. 12/1

U.O.R. to H.& L.G.D. No. 410 dt 13-1-48.

K.V.G./21-5

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L.D.R.I.No. 4833 dt 22-4-48

In connection with the proceedings instituted against the Sarpanch of Village Panchayat, Palghar the panchayat sanctioned from time to time the expenses for the defence of the proceedings. The newly constituted Village Panchay Palghar, by its resolution No. 6 dt. 29-5-45 decided that if the expenditure incurred from the panchayat fund was not necessary the Collr. should recover the amount from the members who were responsible for the loss caused to the Village Panchayat. The Collr. of Thana accordingly issued notices to the members of the previous Village Panchayat calling upon them to show cause as to why the loss caused to the Village Panchayat fund should not be recovered from them. In his order dated 5-2-47, the Collr. of Thana, held that there were no sufficient grounds to saddle the members with the liability under sec. 110 of the Bom. Village Panchayat Act. The Sarpanch being dissatisfied with the Collr's decision, preferred an appeal to the Commr., N.D./ decided that "all th members, who voted for the resolutions sanctioning the expenditure from time to time, are jointly and severall responsible for the loss." The amount of Rs. 975/- was accordingly ordered to be recovered from the members concerned.

/ under section 110(4) of the Act for the reason stated in his order No V.P. 159 dt. 8-11-47 Commr. N.D.

The question for R.L.A's consideration is whether Govt. can, if it so desires, ttake action under sec. 107A of the Bom. Village Panchayats Act and revise the order passed by the Commissioner, N.D.

Reply may be:-

It would be open to Govt. to take action under section 107A of the Bom. V. Panchayats Act, 1933 and revise the order passed by the Commissioner in the present case.

Sd/- P.M.Lad. R.L.H

(MISS)K.V.G./17-5 4C.

U.O.R. to H.D.L.G.D. No 4378 & 6-5-48

Office of the H.L.A.

Bombay Village Panchayats Act, Section 21.

The District Local Board, Kanara, desires to know whether the previous sanction of the Collector is necessary before the District Local Board can consider the question of removal of Sarpanch of the Village Panchayats under section 21 of the Bombay Village Panchayats Act, 1933, or whether the sanction of the Collector is required for the removal of the Sarpanch after the Board has resolved to do so. The Health and Local Government Department consider that the previous sanction of the Collector is required for the removal of any member or Sarpanch or Deputy Sarpanch from his office and not for the consideration of the question by the District Local Board. The H.L.A. is requested to advise.

Section 21 of the Bombay Village Panchayats Act, 1933, provides that the District Local Board may after giving due notice to the Panchayat and after such enquiry as it thinks fit, remove from office with the previous sanction of the Collector any member, or any Sarpanch or deputy Sarpanch, who has been guilty of misconduct or neglect of or incapacity to perform his duty, or is persistently remiss in the discharge of his duties. Sub-section (1) of section 43 of the Bombay District Municipal Act, 1901, provides that every Municipality may from time to time with the previous sanction of the Commissioner make by laws on various subjects. The words "with the previous sanction of the Commissioner" in that provision were construed in 'Emperor Vs. Dirinbai Sorabji' (42 Bom. L.R., p. 1030) as making by-law by the Municipality by passing a suitable resolution so that the resolution must be passed after the sanction of the Commissioner has been obtained. In his opinion No. 3078, dated the 27th April, 1943, the H.L.A. construed the words

P.T.O.

"previous sanction" in section 27A(2) of the Bombay Primary Education Act as meaning sanction before passing the order of dismissal. The words "with the previous sanction of the Collector" in section 21 of the Bombay Village Panchayats Act, 1933, will have to be similarly construed as meaning that the sanction must precede the resolution of the District Local Board removing from office any member or sarpanch. It follows, therefore, that the District Local Board must first pass a resolution requesting the sanction of the Collector for the removal of any member or a sarpanch and after obtaining the sanction of that officer, it must pass another resolution removing from office such member or sarpanch. This procedure should be followed under section 21.

Sd/- P.M.LAD.
Remembrancer of Legal Affairs.

U.R. to H. and L.G.Department, No. 4107, dated the 28th April 1948.

(Miss) K.V.G./17-5
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Office of the Mahal.

The view taken by the Health and Local Government Department that the Collector's order setting aside the general election under section 9 of the Bombay Panchayat Act, 1933, is invalid, is correct. Under section 9(1) the Collector can declare an election invalid only if any member has been elected in contravention of the provisions of section 5 or that any corrupt practice or irregularity has been committed in connection with such election and that such illegality, corrupt practice or irregularity has materially affected the result of the election. In the present case, there is no allegation of any corrupt practice nor is there any allegation that there was any irregularity or illegality which materially affected the result of the election. All that the Collector says in his order is that the general election was held much earlier than the time when it should have been held. The life of the Village Panchayat in the present case was to expire on 12.12.1947. Section 7(1) provides that the election of members to a panchayat shall be held on such date as the Collector may appoint in this behalf. Under section 11(1) the members of a Panchyat shall, save as otherwise provided in this Act, hold office for a term of three years, and under section 12(2) the term of office of outgoing members shall be deemed to extend to and expire with the day before such meeting. Subsection (1) of section 12 provides that the first meeting of the Panchayat will be held on a date fixed by the President of the District Local Board within 4 weeks from the date on which the names of the elected members are published under section 8. It is therefore apparent that what is material is the date of the publication of the names of elected members for the purpose of holding the first meeting of the Panchayat. The general election will have to be held on such date

and the date of the election was fixed on 16-9-47.

P.T.O.

12-14

as it would be possible for the new Panchayat to be constituted so as to synchronize with the expiry of th the old panchayat. Considered in that light, it cannot be held that the general election was held much earlier than when it should have been held. Further section 7(1) gives ample discretion to the Collector to fix the date of the general election. Consequently, the view taken by the Collector is not correct and the order passed by him under section 9(1) is untenable. There would, therefore, be no legal objection to Government setting aside the order of the Collector under section 107(2).

2. It is true that the first meeting of the Panchayat was held after 4 weeks from the date on which the list of the elected members was published under section 6, which is i contravention of section 12(1), and in the event of a dispute arising as to the validity of the election of a Sarpanch, the Collector could have passed an order under section 17(3). But there appears to be no such dispute. The newly elected Sarpanch seems to have taken over charge of his office. A person de-facto in possession of an office is presumed to be rightly in possession until the contrary is established by due course of law (See Halsbury, Vol. VIII, p.34). Consequently, any interference with the election of the Sarpanch at this stage even though his election at a meeting called after 4 weeks from the date of the publication of the elected members may not be quite in order, would be unwarranted.

Sd/- P.M.Lad.

Remembrancer of Legal Affairs.

U.R. to Health and Local Government Department, No. 4933 dated the 24th May 1948.

Office of the H.L.A.

Bombay Village Panchayats Act, 1933.

It is presumed that the Legi..... does not intend to deprive the Crown of any prerogative, right or property unless it expresses its intenti to do so in explicit terms or makes the inference irresistible (see Maxwell p. 120). The contravent of by-law 30 of the By-laws of Goregaon Panchayat would be punishable with fine and that by-law if held applicable to the Crown would deprive the Crown of its prerogative and affect the Crown prop property. Consequently that by-law would not bind the Crown.

P.M.LAD.
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Remembrancer of Legal Affairs.

U.O. to Milk Comm., No. 5546 dated the 14th June 1948.

(Miss) K.V.C./17-5
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Office of the R.L.A.

Bombay Village Panchayats Act, 1933. Section 12(2) (---).

Terms of office of Village Panchayat members.

R.L.A's opinion No. 1888, dated

In view of the fact that steps are being taken to hold the general election early section 12(2) of the Bombay Village Panchayats Act, 1933, can be availed of for continuing the outgoing members in office until the date before the meeting called for the election of a new Sarpanch (see R.L.A's opinion No. 1888, dated 24-3-1938).

Sd/- P.H.LAD
16/6

Remembrancer of Legal Affairs.

U.R. to H. & L.G.D., No. 5630 , dated the 16th June 1948

K.V.G./17-6
4C.

Office of the R.L.A.

Bombay Village Panchayats Act, 1933. Section 110(2) and (4).

It appears that the Collector of Thana issued a notice to certain ex-members of the Village Panchayat, Palghar, to show cause under section 110(2) of the Bombay Village Panchayats Act, and after considering all the circumstances ordered that there were no sufficient grounds to saddle the members with the liability under section 110 and the notices served on them were discharged. The new Sarpanch of the Village Panchayat however preferre an appeal to the Commissioner, N.D., under section 110(4) who directed that all the members who voted for the resolu tions sanctioning the expenditure from time to time were jointly and severally responsible for the loss and that the amount of Rs. 975/- should be recovered from the persons specified in the order. The members who were directed by the Commissioner to pay the amount have now preferred an appeal to Government. H.M. (L.S.G.) in his minute dated 5.6.1948 observed : "The wording of section 110(4) of the Village Panchayats Act seems pretty clear. I am, therefore, not sure whether the Commissioner was right in taking the action he did in this case under section 110(4), when the Collector had discharged the notices issued by him against the ex-Sarpanch and ex-members of t Village Panchayat." The R.L.A. is requested to advise whether the order passed by the Commissioner is intra vire

The view taken by MM.H.M.(L.S.G) is correct. Sub-section (1) of section 110 of the Bombay Village panchaya Act, 1933, makes every member of a panchayat personally liable for the loss, waste or misapplication of any money or other property of the panchayat to which he has been a party or which has been caused by his misconduct or gross neglect of his duty as a member. Sub-section (2) provides that if after giving the member concerned a sufficient opportunity for showing cause to the contrary, the Collector is satisfied that the loss, waste or misapplication of any money or other property of the panchayat

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IS A DIRECT CONSEQUENCE OF MISCONDUCT OR GROSS NEGLECT / small letters on his part, the Collector shall, by order in writing direct such member to pay to the panchayat, before a d fixed date, the amount required to reimburse it for such loss, waste or misapplication. Sub-section (4) provides that the decision of the Collector shall be subject to an appeal to the Commissioner as to the liability of a member under sub-section (3) and as to the amount to be recovered from him. Although an appeal presupposes two parties, it appears from sub-sections (3) and (4) of section 110 that the only person who is given a right of appeal is the aggrieved member against whom an order is passed under sub-section (3), otherwise there would have been some provisions in sub-section (3) requiring a notice to be given to the Panchayat also in which case the Panchayat would have been considered a party of the proceedings and in the event of a discharge of notice issued against a member, the panchayat could have a right of appeal under sub-section (4). The appeal is confined to the questions of the liability of a member and the amount to be recovered from him. Naturally, therefore, the appellant would be the person held liable and none else; the section does not contemplate that the appellate authority should be moved to fix liability in appeal. It is, therefore, clear that the appeal to the Commissioner against the order of the Collector of Thana discharging the notice was incompetent and the Commissioner had no power to set aside the order of the Collector. Consequently the order passed by the Commissioner in the present case is ultra vires.

Sd/- P.H.Lall
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Remembrancer of Legal Affairs.

U.S. to H. and L.J.D., No. 6339, dated the 26th June 1948.

Miss) K.V.G.

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4C.

Office of the R.L.A.

The Bombay Village Panchayats Act, 1933, section 21.

Section 21 of the Bombay Village Panchayats Act, 1933, empowers a District Local Board to remove a sarpanch or member with the previous sanction of the Collector. The Bombay Village Panchayats Act, 1933 do not provide an appeal or an application for revision against the decision of the Collector granting or refu ing the sanction. The discretion to grant or refuse sanction vests in the Collector and can be exercised by that officer alone. Section 107 of the Bombay Village Panchayats Act no doubt provides that in all matters connected with this Act the Commissioner has and can exercise the same authority and control over the Collector, as he has and can exercise in connectic with general and revenue administration. In exercise of that power the Commissioner can in suitable cases give instructions to the Collector and also may, if a proper case is made out, suggest to the Collector to review his decisions. But he has no power to pass an order himself under section 21 of the Act. Att attention in this case is invited to R.L.A's opinion in Girase's case dated 31st August 1938. The [illegible] taken by H.H., H.&L.G.D. is correct.

Sd/-

Additional Secretary to Government.

U.R. to H.&L.G.D. No. 7659 dated 13th August 1943.

(Miss) K.V.G./17-8

4C.

Office of the R.L.A.

Crown's liability to pay taxes -- The Bombay Village Panchayats Act, 1933 -- Section 89.

It is a general rule that Crown is not bound by statute unless named in it expressly or by necessary implication. It does not appear that the Crown is named in any of the provisions of Chapter IX of the Bombay Village Panchayats Act, either expressly or by implication. Consequently, it appears that Crown property would be exempt from the tax under section 89 (Cf. R.L.A's opinion No. 1715, dated 10th March 1943).

Sd/- P.M.LAD
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Remembrancer of Legal Affairs.

U.R. to R.D. No. 8183 , dated the 26th August 194

(Misc) K.V.C./17-5

4C.

L.D.R.I. No. 7834 24.6.1948,

Submitted with reference to R.L.A's opinion No. 4107, dated 28.4.1947.

H.E., L.S.G. does not agree with the above mentioned opinion of the R.L.A. and thinks that the requirements of section 21 of the B.V.P. Act, 1933 woul be fulfilled if a D.L.B. passes a resolution for the removal of the member concerned and then obtains the sanction of the Collector.

The papers have been referred to the R.L.A. for obtaining the opinion of the Advocate General in the matter.

It is for orders whether a copy of the R.L.A's opinion may be forwarded to the Advocate General with a request to opine whether the sanction of the Collector is required for the removal of the Sarpanch after the Board has resolved to do so.

A statement of the case for Adv. General's opinion not appear which necessary, as the Health and Local Govt. Depts. has marked the case for Adv. Genera General through R.L.A. Attention of the Adv. General may be invited to R.L.A's opinion No. 4107 of 28-4-47 and he may be requested to favour Govt. with his opinion.

necessary before D.L.B. can consider the question of removal of a Sarpanch of the V.P. under Sec. 21 of the B.V.P. Act. 1933, or whether the sanction of the Collector

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Office of the R.L.A.

The Advocate General, Bombay, agrees with the view expressed in R.L.A's opinion No. 4107, dated 28-4-1948.

Sd/- P.R.LAD
24/8

Remembrancer of Legal Affairs.

U.O. to H.Cl.C.D. No. 8048 dated the 24th August 1948.

(Misc) K.V.C./17-8

4C.

Office of the R.L.A.

The Health and Local Government Department observes:

"Although Government has not so far prescribed any rules for regulating the disciplinary matters in respect of the Secretaries, Village Panchayats apparently are not precluded from taking any disciplinary action against their Secretaries, who are their servants, in case they do not carry out their duties properly".

The question for consideration, therefore, is whether, in the absence of any rules framed by Government under clause (e)(i) of sub-section (1) of section 103 read with section 53(1) of the Bombay Village Panchayats Act, Village Panchayats can take disciplinary action against the secretaries deemed to have been appointed under section 53(1).

2. Section 53(1) as it stood before the amendment provided that the secretary shall be appointed by the Provincial Government and his powers, duties, remuneration and conditions of service shall, subject to the provisions of sub-section (2), be as may be prescribed. Sub-section (2) authorised Government to remove the Secretary upon a resolution by the Panchayat and also if it appeared to Government that he was incapable of performing the duties of his office or had been guilty of misconduct or neglect which rendered his removal expedient. By reason of the recent amendment, every Secretary of a Panchayat in office on the date of the coming into operation of the amending Act shall be deemed to have been appointed under sub-section (1), which provides that it is the Panchayat which shall appoint a Secretary and that he shall be a servant of the Panchayat and that his qualifications, powers, duties, remuneration and conditions of service (including disciplinary matters) shall be such as may be prescribed.

3. Whatever rules may have been framed under the section before it was amended would no longer be effective inasmuch as they would not be consistent with the new provisions under which the appointing authority is the Village Panchayat and the Secretary becomes a servant o.

of that Panchayat.

4. It would not also seem legally feasible to fall back upon the general law of master and servant for th purpose of taking disciplinary action against Secretaries on the ground that no rules have been framed under the amending Act. The Secretaries were formerly subject to certain statutory rules and the power of removing them was given to Government acting on their own initiative or acting upon the recommendation of the Village Panchayats. These Secretaries are now by a statutory fiction to be deeme to have been appointed by the Panchayats under sub-section (1) of section 33. That sub-section itself contemplates that rules regarding disciplinary matters (which are in terms mentioned) shouldbe framed. It would be going beyond the intention of the amending law that Secretaries, who were formerly subject to rules and who are being transferred by a statutory fiction from Government service to the service of the Panchayats, should have their conditions of service, including disciplinary matters, left unregulated by rules, and that such conditions shhuld be left to the mere pleasure of each individual Panchayat. In deciding whether the power to make rules is coupled with a duty to make them must be judged by the test of the intent of the Legislature and in general is to be solved from the context, from the particular provisions and from the general scope and objects of the enactment conferring the power.

Borrowing the remarks of Sir Richard Couch in the case of Gould v. Stuart, 1896 A.C. 575 at 578 , we can say that the provisions of sub-section (1) of section 33, which were manifestly intended for the protection and benefit of the Secretaries, are inconsistent with importing into the contract of service the term that the Panchayat may put an end to it by recourse to the general law. In that case the provisions would be superfluous, useless

and delusive. Moreover, it is an established principle of law that, where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. Therefore, inasmuch as the amending Act requires that rules should be made for governing disciplinary matters and also on the grounds of general equity, it would not be legally in order that recourse should be had to the ordinary law of master and servant for removing or dismissing the delinquent Secretaries.

5. I would like to add that now that the rules under the amending Act are themselves being issued, there is no special reason to fall back upon the ordinary law. The pending cases should be disposed of under the rules.

Sd/- P.N.JAIN
24/8

Remembrancer of Legal Affairs.

U.R. to H.&L.G.D. No. 8110 dated the 25th August 1948

(Miss) K.V.G./17-5

4C.

Office of the R.L.A.

Question whether Nyaya Panchayat exercises the powers of a village Bench Bom. Village Panchayats Act, 1933 amended by Bom. LX of 1947 -sec- n 37(2).

By Home Department notification No.4514/4 ated the 23rd July 1943, issued under sub-section (2) of section 37 of the Bombay Village Panchayats Act, 1933. Government has conferred certain judicial powers on the village benches constituted for the villages specified in column 3 of the Schedule appended thereto. The Collector of Poona presumes that the judicial powers conferred by the aforesaid notification can still be exercised by the Nyaya Panchayats constituted under section 37(2) of the Bombay Village Panchayats Act, 1933, as amended by Bombay Act LX of 1947.

2. The Bombay Village Panchayats Act, 1933 has been amended by the Bombay Village Panchayats (Amendment) Act, 1947 (Bom. LX of 1947) whereby the village bench has been substituted by nyaya panchayat. Consequential amendments in this respect have been carried out throughout the Act. It is, therefore, clear that the constitution, powers and other function of a nyaya panchayat are the same as those of a village bench, the change being merely in the nomenclature. Under section 26 of the Bombay General Clauses Act, 1904, the orders, notifications, rules, bye-laws, etc., made under an enactment repealed and re-enacted will continue to be in force so far as they are not inconsistent with the provisions re-enacted. If under a notification issued under a repealed enactment, certain powers vest in an authori and under the re-enactment those powers vest ina different authority, that notifications shall would not be considered to be in force under the re-enactment. In the present case no different authority has been substituted under the re-enactment. The authority under the repealed Act is continued to exercise the powers through under a different name. Consequently,

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there appears to be no legal objection to holding that the old notification No. 4614/4 dated 23-7-1941 would continue in force under the re-enactment. It appears, however, safer to adapt that notification by substituting the words "Nyaya Panchayat" for the words "village bench".

Sd/- P.H.Lad.

Remembrancer of Legal Affairs.

U.R. to H. D. No. 9213 dated the 29th September 1948.

(Miss) M.V.G./17-

4C.

Office of the R.L.A.

It is true, as pointed out by the R.L.A. in his last opinion No. 1497, dated 18th February 1941, that if the election fails in toto, the duty of making appointments under section 6(3) of the Bombay Village Panchayats Act, 1933, will have to be exercised as expeditiously as possible, i.e. within a reasonable time, either by the District Local Board or upon default, by the Collector. And neither authority in the present case exercised that power expeditiously and appointed members to the Village Panchayat of Wasad within a reasonable time. The appointment ultimately made of members by the District Local Board to the Panchayat of Wasad after a lapse of more than two years cannot be considered as having been done within a reasonable time. But the failure to make appointments within a reasonable time, would not by itself be sufficient to invalidate the appointments particularly when the members thus appointed have assumed office and have been functioning for, "a person de facto in possession of an office is presumed to be rightly in possession until the contrary is established by due course of law" (see Halsbury's Laws of England, Vol.8, p.34). Section 8(1) which empowers the Collector to declare election invalid will have no application to the present case for, the members now in office are appointed by the District Local Board and not elected by the villagers.

Section 11(1) of the Bombay Village Panchayats Act provides that the members of a Panchayats shall save as otherwise provided in this Act hold office for a term of three years. The term "members" mean members elected or appointed. Consequently the members, who have been appointed to the Village Panchayat of Wasad will be entitled to remain in office for a period of three years from the date of the first meeting of the Panchayat. It would not, therefore, be legally feasible to dislodge these members by holding fresh elections early.

Sd/- P.H.LAD.
Remembrancer of Legal Affairs.
dated the 30th Oct. 1948.

V.G./17-5 4C.

U.R. to H.&L.G.D. No. 10263

L.D.R.I. No. 14266 dated 27.10.1948.

Submitted.

2. The Village Panchayat Nayaya, Taluka Matar under its resolution No. 1 dated 18.12.1945. resolved to be a member of the Kaira district Gram Panchayat Mandal, Nadiad and authorised the Sarpanch to incur the necessary expenditure. The membership fee paid on 23.12.1945 of the said Mandal cost the Village Panchayat Rs. 11/- only. The President of the District Local Board Nadiad while auditing the accounts of the V.P. for 1944-45 and 45-46 raised an objection to the said expenditure under his audit memo. and asked the V.P. to refund the amount to he V.P's account. The V.P. have approached Govt. to waive the recovery of the expenditure i curred by t he V.P. H. and L.G.D. is of the opinion that the expenditure is justified and that the objection raised by the D.L.B. can be ~~exercise~~ overruled. R.L.A. has been requested to advise whether the view is correct.

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A.S.

Sd/- 2/12

ALR

Sd/- 3/12

R.L.A.

Sd/- P.M.LAD
3/12

(Miss)K.V.G./17-5

4C.

Office of the R.L.A.

Whether th President District L... Board order refund of any amount if mis-applied by a Village Panchayat.

The Bombay Village Panchayats Act, 1933.

Section 32 and Section 97.

Seen and returned.

The President's order is not lawful since the power to order refund vests in the Collector under section 97 of the Bombay Village Panchayat, Nayka to the Kaira District Gram Panchayat Mandal is intra vires section 32 (see R.L.A's opinion No. 5040, dated 16-7-1946)

Sd/- P.M.LAD
3/12

Remembrancer of Legal Affairs.

U.R. to H.&L.G.D. No. 11469 dated the 4th December '48.

(Misc) K.V.G./17-5

4C.